NO. 14-18-00302-CR

IN THE FOURTEENTH COURT OF APPEALS

AT HOUSTON, TEXAS

DUKE EDWARD

APPELLANT

V.

THE STATE OF TEXAS

APPELLEE

On appeal from the 212TH Judicial District Court

Galveston County, Texas
Hon. Patricia Grady, Presiding

Trial Cause No. 17CR1965

APPELLANT'S ORIGINAL BRIEF

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NO. 14-18-00302-CR

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IDENTITY OF PARTIES AND COUNSEL

Appellant certifies that the following is a complete list of the parties, attorneys, and any other person who has an interest in the outcome of this lawsuit.

Appellant

Duke Edward

Appellee

The State of Texas

Counsel for Appellee

Jack Roady
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Attorney for the State of Texas

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STATEMENT OF THE CASE

Duke Edward, Appellant, was charged under Section 22.01(a) and (b) of the Texas Penal Code with the crime of knowingly or recklessly causing bodily injury to a family member as defined by Section 71.0021(a) and (b) of the Texas Family Code. Appellant was convicted of the offense on conclusion of a jury trial in the 212th Judicial District Court of Galveston County, Texas (R.R. Vol. 3, p. 72). Appellant plead true to Enhancement Paragraph 1, prior conviction of the offense of Possession of a Controlled Substance; and plead true to Enhancement Paragraph 2, prior conviction of the offense of Burglary of Habitation; and , after trial, was sentenced by the jury for the commission of the offense, as enhanced, to the Texas Department of Criminal Justice for a period of 60 years (RR Vol. 4, p. 47). Appellant now appeals his conviction and sentencing for the offense.

ISSUE PRESENTED FOR REVIEW

1. The 212th Judicial District Court should have granted Appellant's Motion for Directed Verdict, and should have acquitted Appellant, and the jury should not have been permitted an opportunity to convict Appellant, because the State failed to present sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that Appellant was criminally responsible for committing each and every element of the crime alleged in the indictment for reasons including, but not being limited to, the Court's actions deprived Appellant of his federal and state rights to due process.

STATEMENT OF THE FACTS

On July 9, 2017, Officer Richard Hernandez of the LaMarque, Texas Police Department responded to a 911 call that the caller, later determined to be Maggie Bolden, had been beaten, and that her assailant was "still here". Officer Hernandez upon arrival and after talking to Ms. Bolden, found Appellant to still be in Ms. Bolden's Apartment. Appellant was discovered in the apartment and subsequently arrested.

Appellant, was charged under Section 22.01(a) and (b) of the Texas Penal Code with the crime of knowingly or recklessly causing bodily injury to a family member as defined by Section 71.0021(a) and (b) of the Texas Family Code. Appellant entered a plea of not guilty. Neither Appellant not complainant testified at the trial.

At the guilt innocence phase of Appellant's trial, the State proffered Exhibits 1 through 7, all of which, except for portions from Exhibit 7, the affidavit , were agreed upon. Appellant objected to a the narrative in Exhibit 7 of the EMS worker who was at the scene, requesting to take the EMS worker on voir dire "to make sure that the first hand information was gathered by her and not the officer'. (R.R.

Vol. 3, p. 5). The Court deferred ruling on Appellant's objection "to consider that at a later time." (R.R. Vol. 3, p. 6), and admitted State's Exhibits 1 through 6.

Appellant was convicted of the offense on conclusion of a jury trial in the 212th Judicial District Court of Galveston County, Texas (R.R. Vol. 3, p. 72). Appellant plead true to Enhancement Paragraph 1, prior conviction of the offense of Possession of a Controlled Substance; and plead true to Enhancement Paragraph 2, prior conviction of the offense of Burglary of Habitation; and after trial, was sentenced by the jury for the commission of the offense, as enhanced, to the Texas Department of Criminal Justice for a period of 60 years (RR Vol. 4, p. 47). Appellant now appeals his conviction and sentencing for the offense.

FIRST ARGUMENT

The 212th Judicial District Court should have granted Appellant's Motion for Directed Verdict, and should have acquitted Appellant, and the jury should not have been permitted an opportunity to convict Appellant, because the State failed to present sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that Appellant was criminally responsible for committing each and every element of the crime alleged in the indictment, specifically, that Appellant and complainant had a dating relationship.

Appellant was charged under Section 22.01(a) and (b) of the Texas Penal Code with the crime of knowingly or recklessly causing bodily injury to a family member as defined by Section 71.0021(a) and (b) of the Texas Family Code. Appellant was convicted of the offense on conclusion of a jury trial in the 212th Judicial District Court of Galveston County, Texas (R.R. Vol. 3, p. 72), and was sentenced by the jury for the commission of the offense as enhanced to the Texas Department of Criminal Justice for a period of 60 years (RR Vol. 4, p. 47).

At the end of the guilt innocence phase Appellant's counsel made a motion for a directed verdict of finding Appellant not guilty on the basis

that the State "failed to meet its burden in the case as charged in the indictment" stating that "Mr. Duke was charged with assault family violence to a family member or someone in a dating relationship." Appellant's counsel contended that the evidence had not risen to a level to prove a dating relationship existed between Appellant and complainant, Maggie Bolden. Appellant further contended that since the complainant hadn't appeared, there was no way to have proven whether the complainant had suffered pain or of the character of the injuries alleged to have been sustained by complainant. (R.R. Vol. 3, pp. 48-49)

Under Section 22.01 (a) of the Texas Penal Code, a person commits an offense "if the person intentionally, knowingly or recklessly causes bodily injury to another, including the person's spouse". An offense under subsection (a)(1) is a Class A misdemeanor, except that the offense is a felony of the third degree if the offense is committed against "a person whose relationship is described by Section 71.0021(a) of the Family Code. Section 71.0021(a) defines "dating violence" as "an act, other than a defensive measure to protect oneself, by an actor that is committed against a victim or applicant for a protective order with whom the actor has or has had a dating relationship;" Section

71.0021(b) defines a "dating relationship" as a "relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature." Section 71.0021(b) goes on to say "The existence of such a relationship shall (emphasis added) be determined based on consideration of : (1) the length of the relationship; (2) the nature of the relationship; and (3) the frequency and type of interaction between the persons involved in the relationship", mandating that all three factors shall be considered.

There was no evidence proffered or testimony given in Appellant's trial as to any of the three factors that Section 71.0021(b)(1), (2) or (3) required be considered to determine if there was a dating relationship between Appellant and the complainant; and, moreover, there was no evidence that the jury had "suo sponte" considered any of these factors. Absent either direct evidence of the factors required by Section 71.0021(b)(1),(2), or (3), or that the jury, on its own instigation had considered these factors, there could be no finding that there was a "dating relationship" between Appellant and complainant, and the Court should have granted Appellant's motion for a directed verdict.

There was no evidence presented of the length of any relationship which may have existed between Appellant and complainant, such as evidence of occupancy of complainant's apartment by Appellant, or witnesses testifying that they had seen Appellant and complainant together over a period of time. In short, there was no evidence presented of any of the myriad of possible evidences of a dating relationship between Appellant and complainant. There were only hearsay statements giving Appellant the ambiguous name of "boyfriend". Were it not for the specific requirements of Section 71.0021(b), (1), (2), (3) the unadorned term "boyfriend" might have been sufficient to allow a trier of facts to imply that Appellant and Ms. Bolden had a "dating relationship", but the inclusion in Section 71.0021 of these specific requirements by the framers mandates that the trier of facts overtly consider them all based on evidence presented. Appellant and complainant's relationship, based on the evidence presented, if any relationship did exist, was a "casual acquaintanceship or ordinary fraternization in a business or social context". There was certainly no evidence presented as required to be considered by Section 71.0021(b), (1), (2), and/or (3) in order that a rational trier of facts could have

found, or made a reasonable inference, that a dating relationship existed between Appellant and complainant.

Two cases illustrate the evidence required to establish such a relationship. In *Oyervidez v. The State of Texas,* No. 01-07-00007-CR , First District Court of Appeals, 2107, a case with facts similar to Appellant's case, the defendant had allegedly hit the complainant, had tied her up, and had left her. Because the complainant did not testify at trial, the State had relied upon a recording of complainant's 911 call as its principal evidence. In the 911 call admitted by the court, the complainant had identified the defendant as her boyfriend, stated that they had been living together "for almost a year", and that she had been "with him four years already". Despite some confusion that the complainant was the person making the 911 call, the 911 operator was told that the caller's "live in boyfriend" had been the person who assaulted her.

Based on the possibility of the resolution of the identity of the complainant and also the identity of her assaulter, and the evidence in the 911 call that some of the requirements of Section 71.0021(b), (1), (2), and/or (3) had been met, the court sustained defendant's

conviction. No such elaboration of Mr. Edward's relationship with the complainant was offered or admitted in his case.

Garza v. Texas, No. 06-14-00088-CR (Court of Appeals Sixth District of Texas at Texarkana 2015), was another assault case involving a dating relationship. Among the evidence presented at trial was that Defendant had asked the complainant out (on a date), that Defendant spent approximately three nights a week at complainant's house, that Defendant would "just come and go" to complainant's house, that Defendant and complainant shared a bedroom and Defendant kept some of his clothes there, that complainant cooked and did washing for Defendant, and that Defendant and complainant discussed there marriage.

In both of these cases, there was evidence presented to comply with the requirements of Section 71.0021(b).

In Appellant's case, however, no evidence had been presented by the State, as there had been in both Oyervidez and Garza, that would have allowed a rational trier of facts to meet the requirements of Section 71.0021(b), (1), (2), and/or (3) that there had been a dating relationship between Appellant and Ms. Bolden.

PRAYER

The 212th Judicial District Court committed irremediable error when it failed to grant Appellant's Motion for Directed Verdict, and should have acquitted Appellant, and the jury should not have been permitted an opportunity to convict Appellant, because the State failed to present sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that Appellant was criminally responsible for committing each and every element of the crime alleged in the indictment.

For these reasons and for the arguments contained Appellant Prays that, upon review and hearing hereof, this Court will reverse the trial Court's judgment and remand this case for a full and adequate hearing, and for all such other and further relief at law and in equity, to which Appellant may show himself justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 24, 2018, a true and correct copy of foregoing *Appellant's Brief* was sent to the following counsel of record in accordance with the Texas Rules of Civil Procedure on the 28th day of December 2018.

JAMES DuCOTE

Jack Roady
Galveston County Criminal District Attorney
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Attorney for the State of Texas

CERTIFICATE OF COMPLIANCE WITH TRAP 9.4

I certify that the length of this *Appellant's Original Brief* was computed on a 2010 MacBook Pro using Microsoft Word 2013 which was instructed to include all portions of this document not excluded by TRAP 9.4 (TRAP 9.4 (i)(1) and (3). The word count so computed is 2421. The font used in the motion is no smaller that 14 point, except for footnotes, which are no smaller than 12 point.

JAMES DuCOTE